1957

Utah Credit Adjustment Association v. Mrs. Stanley J. Lake : Brief of Appellant

Utah Supreme Court

Gordon I. Hyde; Attorney for Defendant and Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH CREDIT ADJUSTMENT ASSOCIATION, a corporation,
Plaintiff,

vs.

MRS. STANLEY J. LAKE,
Defendant.

Case No. 8626

Appellant's Brief

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STATEMENT OF FACTS

This is an action brought by the plaintiff, Utah Credit Adjustment Association, alleging itself to be the assignee of a claim accruing to the Fuchs Ready-to-Wear Store in Billings, Montana.

The plaintiff alleges in its complaint that the defendant herein and her former husband, L. B. Baldwin, purchased certain goods from the Fuchs

store for which there is a balance owing. The plaintiff alleges further in its amendment to the complaint (R-7) that the claim has been assigned to it by Fuchs and that the plaintiff, Utah Credit Adjustment Association is the "holder" of this claim "and holds the said account for collection." (R-7)

The defendant denied all of these allegations and put the plaintiff on its proof of the same.

At the trial of the case the plaintiff introduced as its sole evidence the depositions made a part of this record, and rested. The defendant then moved for a dismissal on the ground that the evidence was not sufficient to sustain a judgment for the plaintiff; this motion was denied. Certain other facts were agreed to and it was then by stipulation submitted to the Court. (R-32-35) The Court found in favor of the plaintiff.

From the denial of defendant's motion to dismiss made at the close of plaintiff's case and from the findings and judgment of the district court, the defendant appeals.

POINT 1.

THERE IS NO COMPETENT EVIDENCE OF AN ASSIGNMENT OF THIS CAUSE OF ACTION TO THIS PLAINTIFF.

The burden is upon the plaintiff to prove by a preponderance of the evidence each element of its case. In the complaint the plaintiff alleges it is a "holder" of this claim "and holds the said account for collection." (R-7) This allegation is apparently intended to allege an assignment to it of this cause of action against Mrs. Lake. Nowhere in the plaintiff's evidence is there any such assignment shown. The plaintiff therefore failed to prove that it had any interest whatever in the claim sued upon and therefore the Court should have entered judgment in favor of the defendant and against the plaintiff. The findings of the Court "that the Fuchs assigned this claim to the plaintiff" (R-52) are completely unsupported by the evidence.

> **"Unless the defendants admit the assignment under which the plaintiff claims, it is incumbent upon the plaintiff to prove a valid assignment in order to show that he has a cause of action." 4 Am. Jur. #128.**

In the case of Read vs. Buffum, 21 Pac. 555, 79 Cal. 77, the plaintiff brought an action alleging that he was the assignee of an account owned by California Powder Works, a corporation. Evidence of a written assignment was introduced, but the plaintiff failed to prove authorization for the assignment by the board of directors of the corporation prior to the commencement of the suit, but did

establish by proof that the assignment was ratified after the suit began. The appellate court in reversing the judgment in favor of the plaintiff rendered by the lower court, said

> "In order to maintain his action, it was necessary for the plaintiff to allege an assignment to him by the California Powder Works of the claim sued upon. And the denial of that allegation by the defendant cast the burden of proving it upon the plaintiff. This he attempted, and failed to do."

In the case of Smith vs. Rowe, 100 Pac. 2d 401, 3 Wash. 2d 320, the plaintiff alleged an assignment to him of an account owed by the defendant to Spokane Monument Co. The defendant interposed a general denial. At the trial the plaintiff offered in evidence a written assignment which was admitted in evidence. The name of the assignee in the written assignment had been left blank. The trial court found for the plaintiff, and the court on appeals reversed the trial court and ordered the action dismissed, saying:

> "An alleged assignee without proof of assignment cannot recover against an obligor by whom assignment is denied. In an action by the assignee against the debtor the plaintiff must prove the material allegations of the complaint which are put in issue by the answer of the debtor. To recover on an assignment of a chose in action it is not only

> necessary that the plaintiff establish that there was a cause of action, *but it is essential that plaintiff establish that the cause of action has been assigned to the plaintiff.*"

The trial court in the Smith case said in a memorandum decision that to deny recovery because of a weakness in the proof of assignment would be "the height of inequity" and that "the technicality must yield to the substance." The appellate court in reply to this sentiment of the trial court quoted from Messick vs. Haux Bros., Inc., 288 Pac. 434, 437:

> "When courts of appeal resort to psychological legerdemain to force a fact into a barren record, it breaks down the law itself and can result in naught but disaster. . . . The judgment is reversed and the cause remanded to the trial court to dismiss the action." (p. 404)

Reference is also made to the following cases that clearly affirm the rule: Calloway vs. Oro Min. Co., 89 Pac. 1070; 5 Cal. App. 191; Little vs. Brown, 283 Pac. 924; 36 Ariz. 194; Sterling Adjust. Co., vs. Laker Auto Spring Co., 2 Pac. 2d 408, 116 Cal. App. 100.

POINT II.

THE DEPOSITIONS ADMITTED IN EVIDENCE WERE NOT TAKEN IN ACCORDANCE WITH LAW AND WERE NOT ADMISSIBLE IN EVIDENCE.

The defendant received notice of the plaintiff's intention to take depositions of certain persons, most of whom are not even named. (R-37) The time set for these depositions was to be November 8, 1955 at 8:00 p.m.

At the trial of this case certain depositions were admitted in evidence over defense counsel's objections. (R-48) These depositions were not taken on the day set in the notice. One of the depositions was taken on the 28th day of December, 1955 and the rest on the 15th day of March, 1956.

Rule 26(a) provides that depositions may be taken "only in accordance with these rules."

Rule 26(d) provides that such depositions may be used against any party who was given "due notice."

Rule 30(a) provides that the notice to be due notice shall state the time and place for the taking of the deposition and the name and address of the

person to be examined. The notice failed to do this and thus is not due notice to defendant-appellant.

CONCLUSION

The defendant's motion to dismiss at the close of the plaintiff's evidence should have been granted because the plaintiff's evidence was not sufficient to make out the elements necessary to prove a prima-facie case.

Respectfully submitted,

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